

# Free Trade in Legal Scholarship?

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I want to decline Rob Howse's [invitation](#) to talk about my own residual anxieties, because he introduces another more interesting theme into the debate: whether scholarship can actually be traded between countries. He suggests that such trade exists, though apparently only in one direction: "It is not as if Americans are going to buy their doctrinal scholarship from Germany [...]; on the other hand, some forms of interdisciplinary scholarship from the US may well be exportable to Germany."

But it was not always so. There was a time, prior to World War I, when many Americans were indeed eager to "buy" their doctrinal scholarship from Germany.

The influence of 19<sup>th</sup> century German legal science on what has come to be called "classical legal thought" in the United States can hardly be overestimated. It can be found in the work of US luminaries like [Holmes](#), [Pound](#), [Fuller/Purdue](#), [Llewellyn](#), and many others. And it can be [seen](#) in the history of American legal education in the 19<sup>th</sup> century. Duncan Kennedy has described this German influence as the first of his [three globalizations of legal thought](#)

That influence decreased when Germany became the enemy in World War I (symbolized most perfectly perhaps in Karl Llewellyn, [who fought this war first in the German and later in the US army](#)). And the fruits of the influence were all but eradicated when legal realism (which, itself, found influences from Germany, especially the late Jhering) rejected the "legal science" borrowed from German formalism that had become untenable, and replaced it with a new scientific approach that sought objectivity in disciplines other than law—economics, psychology, political science, a science of values, etc. The interdisciplinary strength was born and grew strong. After World War II, when German law was thoroughly discarded, "[the wind changed](#)"—US law became dominant and began to influence the law, both in Europe and elsewhere.

One can debate whether these respective influences constitute a trade in legal ideas, in which the best product finds the most consumers. Perhaps they are rather evidence of [hegemony](#), in which a strong country—19<sup>th</sup> century Germany, 20<sup>th</sup> century US—imposes its respective legal culture on others. But reality is more complex. After all, although we sometimes think that ideas remain unchanged by their transfer, this is rarely the case. In reality, models from one country rarely fit another country. Instead, they function as irritants that are either rejected, or create an impulse of local reform. In my [last post](#) I mentioned an example of effective rejection: the Americanization of Japanese legal education as an example of a transfer that failed, because the US model was not adapted to the recipient system. The German Council of Science and Humanities proposes an adaptation—rather than trying to Americanize German scholarship and education, it suggests that reform can take up influences from elsewhere, and combine them with local tradition.

If Rob Howse finds this insufficient, this may be so because he does not focus on an entire culture. He takes issue with my focus on the average scholar in each country—we should, he thinks, rather focus on excellence. I find this problematic—the vast majority of US lawyers are not educated at NYU (or even Duke), and the vast majority of German academic scholarship remains focused on German doctrine. If both reports on legal education that spurred this forum focus on the entire system, not just the top institutions, they do the right thing.

But his emphasis on excellence raises a further interesting question. Could it be that the trade and exchange of scholarship are becoming elite privileges? Do they create a globalized elite of legal scholars worldwide, while other institutions become marginalized? In the United States, where the difference between the best and the worst law schools is enormous, the best schools (Harvard, NYU, perhaps even Duke) have the ability to initiate and shape a global discourse (though Christopher McCrudden, in his recent [post](#), points out how much more internationalized UK schools are). But most US schools do not have that ability, and the ABA report certainly does not encourage them to.

And in Germany, one problem is that (as I am told) universities put so many demands on their professors that it becomes hard for them to find the time and resources to produce good and broad scholarship that is not doctrinal. Consequently, much of the scholarship that is globally influential takes place outside of the law faculties. It is not a coincidence that all three German scholars whom Howse mentions as influential have tenuous relations to traditional German law faculties—Armin von Bogdandy directs a [Max-Planck Institute](#); Christian Joerges spent most of his career at the European University Institute, and even Christoph Moellers now holds a five year position as a Permanent Fellow at the [Berlin Institute for Advanced Study](#). Such promotion of excellence is desirable. But if the Wissenschaftsrat really wants to change legal scholarship in Germany, it must, as it does, also focus on the breadth of existing institutions.

In view of all of this, my original claim that German doctrinal scholarship will always be superior to that of other nations should hardly sound triumphant. The main reason for this prediction is not some German innate superiority, nor cultural determinism, but rather a practical fact: other countries do not focus nearly as much on legal doctrine as Germany. Rob Howse points out that US scholars produce “subtle and careful commentary on appellate and Supreme Court jurisprudence”. In 19<sup>th</sup> century Germany, such commentary would have been considered nothing more than “[lower jurisprudence](#),” a mere preliminary stage for “true, scientific, jurisprudence”. German “high” doctrine is on a level of its own and will remain alone there, simply because other countries will hardly want to build a similar expertise that looks dated, at the cost of other developments. (As Howse himself says: nobody would buy it.) Many, in Germany and elsewhere, rightly see this traditional near-exclusive focus on doctrine as an actual current weakness, a relic of the past that has not only isolated German scholarship in the global discourse, but has also put education and scholarship out of touch with the needs of contemporary Germany to be left behind. If this weakness can be turned into a strength, as the Wissenschaftsrat suggests, Howse may think this conservative; I think it would be a remarkable achievement.

